Supreme Court, U.S.
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No. 01-1627

In The

SUPREME COURT OF THE UNITED STATES

Richard Jewell,

Petitioner,

v.

Cox Enterprises, Inc., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an individual who gains prominence by choosing to make numerous appearances in prominent media outlets, and uses that prominence to speak out repeatedly on a public controversy, may be deemed a voluntary limited-purpose public figure in connection with that controversy.

2. Whether the Court's recognition of the involuntary public figure doctrine in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), has been overruled in subsequent cases in which the doctrine was neither raised by the litigants nor ruled upon by the Court.

CORPORATE DISCLOSURE STATEMENT

Respondent Cox Enterprises, Inc. is the sole corporate respondent in this case. Cox Enterprises, Inc. has no parent corporation and no publicly held company owns 10% or more of the stock of Cox Enterprises, Inc.

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Respondents, The Atlanta Journal-Constitution, its editors and its reporters (collectively, "The Journal-Constitution") respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari of Richard Jewell.

STATEMENT OF THE CASE

Petitioner was one of the guards entrusted with security in Atlanta's Centennial Olympic Park, the centerpiece of the 1996 Summer Games. In this role, petitioner spotted a suspicious package containing a bomb that later exploded, killing two citizens and injuring many more.

The explosion reignited a public debate over Atlanta Olympic security, particularly Olympic Park security, that had preceded the Games. R. 289. Public concerns and anxiety had already mounted when, only two days before the Games began, TWA Flight 800 crashed off Long Island under circumstances that initially suggested a terrorist act. With the Park bombing, and the rash of bomb scares and evacuations that followed, *see* R. 284, 307, there was an intense search for understanding about what happened and whether it was likely to happened again.

Questions immediately arose as to whether the bombing was connected to domestic or international terrorism, R. 25,582-639, and whether event organizers had adopted adequate security measures, including the hiring and training of qualified security officers. R. 25,640-680. The adequacy of Olympic security's response to the blast was also questioned. Opinions were split -- had security personnel acted properly or had they been slow and uncoordinated in responding? R. 25,681-716. Questions also were raised as to why security forces in the Park only learned of the bomber's warning call to 911 after the explosion. *Id.* Finally, in the days immediately after the

blast, the safety of reopening Olympic Park and returning to the Games was vigorously debated. R. 25,717-763.

Because of his role in the bombing response, petitioner was interviewed by law enforcement agencies. R. 2,819-20. Members of the press also were interested in interviewing petitioner to see what light he could shed on the issues raised by the bombing. Petitioner had no obligation to speak with the press and was concerned that speaking publicly might harm the bombing investigation. R. 23,539. Despite these qualms, petitioner chose to spend much of the next three days engaged in a hectic schedule of appearances with prominent media outlets. Amid the heated debate over Olympic Park security, petitioner repeatedly went before the nation, providing his viewpoints on the bombing preparation and response and offering reassurances about public safety.

Petitioner's Post-Bombing Media Appearances

Petitioner's heroic "first responder" role was widely reported within hours after the bombing, and he gave so many media interviews in the next days that he no longer remembers them all. R. 25, 129-30. For example, petitioner does not recall that on the day of the bombing he gave an interview to the *Boston Globe*, which published at least two reports of the interview, the first on the day after the bombing. R. 494, 22,045-47.

Petitioner does recall that a spokesman for AT&T contacted him the day of the bombing with the information that one of the nation's preeminent news networks, CNN, was interested in an interview. AT&T did not employ petitioner and the company had no authority to arrange interviews on his behalf. Nonetheless, petitioner agreed to appear and drove to CNN headquarters where he was met by AT&T media specialist, Bryant Steele. R. 23,533-537. At

CNN, petitioner provided a fifteen-minute live interview, portions of which were later replayed repeatedly to a national audience. R. 23,540-541; Supp. R. 181, 183. Mr. Steele then told petitioner about other press inquiries and asked whether he would be interested in appearing for other interviews, including a follow-up appearance on CNN. R. 23,537-538.

Mr. Steele warned petitioner that giving interviews could be hectic, stressed that petitioner had no obligation to make appearances, and reminded petitioner that he could stop granting interviews at any time he chose. R. 23,537-538. Although concerned that talking to the press might harm the bombing investigation, petitioner authorized Mr. Steele to arrange media appearances on his behalf. R. 23,539. Later that day, petitioner phoned a reporter, whom he believes was from one of the nation's largest newspapers, the *Washington Post*, to give another interview. R. 24,961, 25,094-095.

On the day after the bombing, petitioner traveled to CNN for his follow-up appearance on the roof of the CNN building overlooking Olympic Park. Supp. R. 181, 183; R. 23,551-552. After approximately one hour at CNN, petitioner granted a telephone interview to a reporter whom he recalls as being from another major newspaper, the *Boston Globe*. R. 23,552-553, 24,963. Immediately afterward petitioner met with reporters from the nation's largest circulation newspaper, *USA Today*. To accommodate petitioner's busy schedule, *USA Today* journalists met petitioner in a parking lot across from CNN where he gave an interview that lasted between 15 minutes and one-half hour and then sat for a photo shoot. R. 23,554-555.

After his *USA Today* interview, petitioner moved on to *The Atlanta Journal-Constitution*, the largest circulation

newspaper in the Southeast. Once there, petitioner granted a one-hour interview, after which he posed for more photos. R. 23,561-562. Petitioner then gave another interview to a television news crew in which he discussed the subject of whether Olympic Park should re-open. R. 23,563. Finally, after briefly talking with journalists from yet another television station, petitioner went home. R. 23,565-566.

The next day, having already been contacted about a possible book deal, petitioner contacted an attorney friend to get advice on handling such opportunities. R. 25,123-124. Petitioner took a break from his hectic schedule later in the day, using free tickets provided by his AT&T driver to take in a baseball game with his mother. R. 25,073. Upon returning home from the game, petitioner returned a waiting telephone message from CNN and then fielded questions during a nationally-televised town meeting program dedicated to the bombing. R. 25,125-126.

The following morning, petitioner traveled to the official Olympic network, NBC, to appear as a guest on *Today*, one of the nation's most-watched morning news programs. Petitioner granted a live interview with Katie Couric in which he defended the response of law enforcement. R. 24,963-964. Immediately after his *Today* appearance, petitioner granted yet another interview to another journalist from NBC news. *Id.* Before leaving NBC petitioner stopped to grant another interview with a reporter whose name and organization he no longer remembers. *Id.* Later that day, in the first of a number of articles challenged by petitioner, The Journal-Constitution accurately reported that petitioner had become the focus of the bombing and accurately explained why he was suspected. R. 337.[1]

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[1] Petitioner's claims of falsity have not yet been tested by any court below and they cannot withstand scrutiny, particularly in light of the considerable factual record developed below as to the focus and basis of

Even the foregoing account of petitioner's media appearances is only partial. R. 25,129-130. Although petitioner cannot recall the exact number of his appearances, it is clear that petitioner became a prominent figure. Many millions of Americans heard and read petitioner's comments on the bombing, the bombing response, security preparedness and Olympic Park safety. These comments echoed throughout the nation and beyond as a myriad of other press organizations reported on petitioner and his views. *See, e.g.*, R. 21,859-988; Supp. R. 169-79.

Petitioner's Comments On The Controversy Over Olympic Park Safety

During his media appearances, petitioner weighed in repeatedly on the issues relating to Olympic Park safety that were then being debated publicly, including whether the planning for and response to the bombing had been adequate. For example, when asked in a CNN interview if his training had been adequate, petitioner offered reassurances, asserting that his training was indeed sufficient to prepare him for the bombing and touting his own previous six years of law enforcement experience. R. 21,867.

Petitioner also supported the adequacy of the response to the bombing:

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the FBI's investigation. For example, although petitioner claims that it was false to report that he had been matched to a law enforcement profile, Petition at 5, the Justice Department has confirmed that one of the reasons petitioner became the focus of its investigation was that profiling agents concluded that petitioner "fit the profile of a person who might create an incident so he could emerge as a hero." R. 22,424. Moreover, The Journal-Constitution's reports did not state or imply that petitioner was guilty or likely guilty of the bombing and did not convey any of the other implications upon which petitioner's claims are based.

> Jeanne Meserve: Do you feel you did all you could?
>
> Jewell: Yes Ma'am. The only thing I wish we could have done was got everybody out of the area. I feel for the victims and their families. I mean, this is the Olympics. This is supposed to be a time of joy for the world and it's a very, very bad thing and I just hope that we catch the people that did it, because I mean, we did everything we could . . . .

Id.

During his nationally-televised appearance on *Talk Back Live*, petitioner again reassured his audience as to the adequacy of the security force's training and response:

> All of the guards hired during the Olympics were given a training class when they were first hired. In that class, we were shown videos, and also instructed on searching bags and using metal detectors. Also, we were issued a book, which goes into more detail than the videos did. Also, my personal training, I am a law enforcement [officer] in Georgia; I'm just not employed right now. . . . I have six years of law enforcement experience here in Georgia. Everybody that was there, the law enforcement, the security guards, the park guards, the paramedics, the firemen, hundreds of citizens all came together at one time to do something that we never thought would happen and that we prayed wouldn't happen. But when it did, I was glad that everything worked out as well as it did.

R. 21,914.[2] Petitioner also supported the adequacy of the bombing response during an interviews in Olympic Park: "Everybody that was here acted so professionally and we did what we needed to do to try and save lives." Supp. R. 181.

By the time petitioner made his appearance with Katie Couric on the *Today* program, questions had arisen about a delay in getting word of the bomber's 911 call to people on the scene at Centennial Olympic Park. Prior to petitioner's live interview, Bryant Gumbel questioned Atlanta Police Chief Beverly Harvard on the subject: "Let's talk about the controversy swirling around your department's response to the tragedy the other night. Woody Johnson, the special agent in charge of Atlanta's FBI office, has said there was a delay in passing information of the threat on after the 911 call." R. 21,939. In his interview with Katie Couric, petitioner argued that the delay did not hinder the response:

> Jewell: [W]e were already reacting to the situation.
>
> Couric: Without the phone call?
>
> Jewell: Without any phone call. So even if the 911 call had gotten to us, we were already -- we were already ahead of it. We were already dealing with the problem. We already instigated a plan.

R. 21,954.

Petitioner also weighed in directly on the issue of whether it was safe to return to the Olympics and Centennial Olympic Park, speaking with a television crew conducting interviews on the issue of whether the Olympics should

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[2] *See also* R. 21,954 (petitioner's comment on *Today* that he "did the job that I was supposed to do" and "used my training the way I was taught").

continue and whether the park should reopen. *See* R. 23,563-564. Later, petitioner garnered audience applause during a nationally televised telephone interview when he offered encouragement to members of the public who had continued coming to the Games:

> Jewell: And I'd also like to take this opportunity, if I could, to thank the citizens of the world for continuing to come to all of the games and venues that they are to show this person or persons that this type of activity will not be tolerated in the world.
>
> Host: And that is the final word, Richard. Thank you so much for joining us. We really appreciate a lot of the support here for your statement from folks in the audience.

R. 21,914.

By choosing to offer his views in major news outlets, petitioner became a prominent figure in the public debate of the safety issues raised by the Olympic Park bombing. Appearing for interview after interview with some of the leading members of the national press in the days following the bombing, petitioner became a key figure, helping many millions of Americans to formulate views on the adequacy of law enforcement preparation, the appropriateness of the bombing response and the safety of returning to the park. As one judge observed, petitioner "became a media hero" in the immediate aftermath of the bombing. *See In re Four Search Warrants*, 945 F. Supp. 1563, 1564 (N.D. Ga. 1996).[3]

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[3] Ironically, petitioner's repeated television appearances were one of the factors that led investigators to conclude he "fit the profile of a person who might create an incident so he could emerge as a hero." R. 22,424.

Petitioner's Motion For Summary Judgment And The Rulings Below

Petitioner first raised the question of his public figure status when he filed a motion for partial summary judgment asking the trial court to decide the issue. After full briefing and a hearing, the trial court issued a detailed written opinion finding that petitioner had become a public figure by virtue of his voluntary participation in the controversy over Olympic Park safety. Looking at the entire record, including petitioner's many media appearances, the trial court found that petitioner had become a voluntary limited-purpose public figure by attempting to influence the controversy over Olympic Park safety. *See* Petition at 35a-40a.

The Georgia Court of Appeals agreed to exercise discretionary jurisdiction over the case and reviewed an array of questions, including the public figure issue. Following plenary briefing and full oral argument, a three-judge panel of the Georgia Court of Appeals unanimously affirmed the trial court's conclusion that petitioner had become a voluntary, limited-purpose public figure by the time The Journal-Constitution published the first of the statements challenged in this action. *See* Petition at 11a-22a. The Court of Appeals also issued an alternate ruling, emphasizing that even if petitioner were not already a voluntary public figure, he would still fall within the narrow class of involuntary public figures. *Id.* at 22a-24a.[4]

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[4] The Court of Appeals also overturned a trial court ruling ordering Journal-Constitution reporters to reveal confidential sources without first considering whether petitioner's libel claims could pass even the most basic tests of legal viability. The Court of Appeals remanded the case to the trial court for further proceedings, including proceedings to determine whether petitioner's claims are legally viable. *See* Petition at 2a-11a.

Because the Court of Appeals held that petitioner was a voluntary public figure or, in the alternative, an involuntary public figure, it did not

Petitioner next attempted to obtain certiorari review of the Court of Appeals' decision in the Georgia Supreme Court. On February 12, 2002, the Georgia Supreme Court unanimously denied certiorari.

I. Consistent With The Prior Decisions Of This Court, Both Of The Courts Below Found That Petitioner Became A Public Figure By Voluntarily Assuming A Position Of Influence In The Public Controversy Over Olympic Park Safety.

A. In Seeking Certiorari, Petitioner Repeatedly Misrepresents The Straightforward Ruling Of The Georgia Court Of Appeals.

The primary ruling of both the Georgia Court of Appeals and the trial court was that petitioner is a voluntary public figure for purposes of this litigation. Each of the courts below had no trouble reaching this conclusion based on a searching review of the record and a straightforward application of the principles first set forth by this Court in *Gertz* and subsequently adopted by the federal circuit courts.

The Georgia Court of Appeals, citing to *Gertz* as the "definitive case on how a private citizen becomes a public figure," Petition at 15a, followed the teaching of *Gertz* and its progeny by "looking to the nature and extent of [petitioner's] participation in the controversy" at issue. *Gertz*, 418 U.S. at 352; *see* Petition at 15a-22a.

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reach the question of whether petitioner also was a public official for First Amendment purposes. That status attaches to petitioner both because of his law enforcement role at the Olympics and because some of the challenged articles discussed his prior troubled career as a Georgia police officer.

First, the Court of Appeals verified the existence of the public controversy over Olympic Park safety in the aftermath of the bombing. *See* Petition at 16a-17a. Petitioner does not challenge the existence of this public controversy and did not challenge it below.

The court then looked closely at petitioner's role in the controversy prior to the publication of the statements he challenges. Reviewing all the facts -- such as petitioner's decision to accept the services of a media handler, his decision to make numerous appearances in prominent media outlets, and the specific content of his remarks during those interviews -- the court had no trouble affirming the trial court's conclusion that petitioner had become a voluntary public figure. Petition at 18a. *See generally id.* at 16a -22a.

Finally, the Georgia Court of Appeals looked at the statements challenged by petitioner and concluded that they were germane to the public controversy at issue. *See* Petition at 21a-22a. Petitioner also does not challenge this aspect of the ruling below.

Perhaps because an honest review of the Georgia Court of Appeals' decision confirms that it is sound and utterly consistent with this Court's prior precedent, petitioner repeatedly misrepresents the content of that decision. Thus, petitioner claims that certiorari is needed because the Georgia Court of Appeals allegedly held that every witness to newsworthy events is automatically transformed into a public figure if he speaks to any member of the press.[5] Indeed, petitioner even claims that the Court of Appeals held

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[5] *See* Petition at 27 ("Under the Court of Appeals' open-ended definition [of voluntary limited-purpose public figures], from the moment Petitioner spotted the package and helped evacuate park patrons from the vicinity of the blast, he was doomed to public figure status if he made any comments whatsoever about the event."). *See generally id.* at 28-29.

he was a voluntary limited-purpose public figure simply "because his acts were heroic and because the media sought him out for interviews to discuss the bombing." Petition at *i*.

These purported holdings not only are unsupported by the ruling of the Georgia Court of Appeals, the plain language of the court's opinion specifically forecloses them. For example, petitioner claims that the Georgia Court of Appeals held that "the fact that Petitioner 'voluntarily made media appearances' when he was 'under no obligation to do so' was sufficient to convert him into a voluntary limited-purpose public figure." Petition at 25.

Even cursory review of the decision below confirms that the Court of Appeals never held, or even suggested, that the mere act of making voluntary media appearances automatically converts a private citizen into a public figure.

Rather than resting its holding on the mere fact that petitioner spoke to the media -- as petitioner claims -- the Georgia Court of Appeals looked closely at the facts surrounding petitioner's many press appearances and the specific content of his public pronouncements in order to examine the "nature and extent" of his participation in the relevant controversy as required by *Gertz*. *See* Petition at 15a-22a. Based on this thorough review of the unique facts in this case, the Georgia Court of Appeals affirmed the trial court's conclusion that petitioner had become a public figure because he "voluntarily assumed a position of influence in the controversy [over Olympic park safety]." Petition at 18a.

Petitioner also claims that the Georgia Court of Appeals somehow deviated from this Court's prior precedent "by making it irrelevant whether Petitioner engaged in the voluntary conduct with the intent to advocate a particular

outcome to a public controversy." Petition at 26. Again, petitioner grossly misrepresents the ruling below.

The Court of Appeals, looking at the entire record, specifically found that petitioner used his media appearances to advocate a particular outcome in the controversy over park safety -- namely the vindication of law enforcement.[6] Petition at 20a ("Viewed objectively, Jewell's numerous media appearances in the days following the bombing reveal that he attempted to improve the public's perception of security at the park."). The trial court reached the same conclusion. Petition at 39a ("[H]is intention, viewed objectively, was to improve the public's perception of security at the Olympic Park in the presumed hope of influencing the controversy.").

Finally, petitioner claims the decision below somehow "establishes the legal principle that factual eyewitnesses to a newsworthy event are always converted into voluntary public figures if they agree to media interviews to discuss the facts of the event." Petition at 8.[7] Petitioner's portrayal of

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[6] Petitioner claims that the decision below conflicts with this Court's decision in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), because that case held that giving several press interviews regarding high-profile divorce proceedings was insufficient to convert one of the parties to the divorce into a public figure. Petition at 24. However, *Firestone* did not suggest that making press appearances can never lead to public figure status. Rather *Firestone* held that the plaintiff had not become a public figure because a private divorce does not qualify as a public controversy. 424 U.S. at 454. The Court also noted that it also was unreasonable to believe that press statements would be able to influence "the merits of the legal dispute . . . or the outcome of [the] trial." *Id.* at 454 n.3. The same cannot be said for the controversy at issue in this case, which, like many public controversies, was played out in the court of public opinion.

[7] *See also id.* at 27 ("Under the Georgia Court of Appeals definition of a voluntary limited-purpose public figure, there is no distinction between speech intended to inform and speech intended to advocate.").

the Court of Appeals decision again contradicts the opinion's clear language. The Georgia Court of Appeals specifically emphasized that its ruling was based on a finding that petitioner did *not* act as a mere factual witness during his media appearances. *See* Petition at 18a ("While Jewell asserts that his media role was limited to that of an eyewitness and that he did not attempt to shape the resolution of any controversy, Jewell's participation in interviews and the information he related about the controversy was not so circumscribed."). The trial court had reached the same conclusion. *See* Petition at 40a ("A different question would be presented if Plaintiff had refused comment or spoken only as to the events witnessed. Taken as a whole, Plaintiff's actions instead reveal a well intentioned attempt, utilizing his newfound prominence, to effect damage control in the public's perceptions.").

Among the reasons that the Georgia Court of Appeals did not make the holdings that petitioner attempts to ascribe to it is that the factual record before the court simply did not present the issue that petitioner claims was ruled upon. The Court of Appeals did not rule that every individual who provides an eyewitness account of a newsworthy event to the press automatically becomes a public figure because the unique facts before it presented a different question.

Both courts below looked at the record and found petitioner was not a run-of-the-mill witness who happened to provide the press with a factual account. Both the Court of Appeals and the trial court emphasized that petitioner first chose a course of conduct that elevated him to a place of unusual prominence and then used that prominence in an effort to influence issues being debated in the public controversy over Olympic Park safety.

B. The Test Applied By The Court Of Appeals Was Not Only Entirely Consistent With This Court's Prior Precedent, It Was The Test That Petitioner Himself Advocated Below.

Petitioner also claims that certiorari is needed because the Court of Appeals erred by following what he calls the "open-ended" public figure test first set forth twenty years ago in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980) and adopted by the Eleventh Circuit fourteen years ago in *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491 (11th Cir. 1988). Petition at 25.

As a preliminary matter, it must be noted that petitioner himself relied on these decisions as his principal authorities when he first asked the trial court to rule on the public figure question. Now petitioner suggests that certiorari is necessary so that he can attack as too "open-ended" the very precedent he relied upon below.[8] Aside from the impropriety of this request, certiorari is not merited both because the test applied by the Court of Appeals was correct and because petitioner is also a public figure under the new test he now points to as the only valid statement of the public figure standard.

In the trial court, petitioner correctly set forth the analysis of *Waldbaum* and *Silvester* by stating that to become a voluntary, limited-purpose public figure: "[T]he plaintiff either (1) must 'purposefully [try] to influence the outcome' of the public controversy, or (2) 'could realistically have been expected, because of his position in the controversy, to

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[8] Petitioner also seeks to call the decision below into question by stating that the court relied only on "selective language" from these cases. Petition at 25. This statement is misleading at best, since the "selective language" the court relied upon expresses the core holdings of the cases.

have an impact on its resolution.'" R. 24,973-74 (quoting *Silvester*, 839 F.2d at 1494).

Petitioner now attacks this analysis, asserting that a proper, "restrictive," test would hold a plaintiff is only a public figure if evidence shows both that he voluntarily assumed a place of influence in a public controversy, and that he concedes he did so with the subjective intention of influencing the controversy. *E.g.*, Petition at 24.

As a threshold matter, it should again be emphasized that the trial court and the Court of Appeals both found petitioner voluntarily assumed a prominent place in the debate over Olympic Park safety and that he attempted to use his position to influence the resolution of that debate.[9] It therefore is clear that petitioner is a voluntary limited-purpose public figure no matter what test is applied. Whether one looks to the test that petitioner relied upon previously or whether one looks to the "restrictive" test that he now claims is the only valid statement of the law, the findings of both courts below require that petitioner must be deemed a public figure. Seen in this light, it is clear that the current Petition is nothing more than an attempt to have this Court conduct yet another review of the record in hopes that it will ignore the evidence relied upon by both courts below.

Moreover, the test applied by the Georgia Court of

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[9] *See* Petition at 18a ("Jewell's actions show that he voluntarily assumed a position of influence in the controversy [over Park security]."); *id.* at 20a ("Viewed objectively, Jewell's numerous media appearances in the days following the bombing reveal that he attempted to improve the public's perception of security at the park."); *id.* at 39a ("[Plaintiff's] intention, viewed objectively was to improve the public's perception of security at the Olympic Park in the presumed hope of influencing the resolution of this public controversy.").

Appeals is entirely consistent with this Court's prior rulings. The Court's ruling in *Gertz* recognized two fundamental criteria that distinguish voluntary public figures from private figures. First, *Gertz* recognized that public figures usually have "greater access to the channels of effective communication [than private figures] and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." 418 U.S. at 344.

Petitioner easily meets this criterion. Petitioner met with so many members of the national and local press, and the number of interviews he granted was so great, he still cannot remember them all. R. 25,129-130. As the Court of Appeals noted, petitioner "was prominent enough to require the assistance of a media handler to field press inquiries and coordinate his media appearances." Petition at 19a.[10]

Under *Gertz*'s second criterion, public figures "voluntarily expose[] themselves to increased risk of injury from defamatory falsehood concerning them" either by general fame or by taking a prominent position in a public controversy. 418 U.S. at 345. Again, petitioner satisfies this criterion. Both courts below looked at the record and found that petitioner used his media appearances to weigh in on

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[10] Petitioner used this access to defend his innocence in the pages of The Atlanta Journal-Constitution itself. *See* "'*Hero' denies planting bomb*," *The Atlanta Journal-Constitution*, July 31, 1996, R. 341. Nor did petitioner's access to channels of communications quickly wane. Long after the bombing, petitioner continued to make appearances in and contacts with the media, including: calling a press conference to proclaim his innocence and publicize his upcoming suit against The Journal-Constitution, making a televised appearance to testify before Congress about his treatment as a bombing suspect, providing an interview as the subject of a *60 Minutes* report, appearing on *Oprah* and *Larry King Live*, providing interviews as the subject of a *Vanity Fair* article entitled "The Ballad of Richard Jewell," shopping the rights to his life story around Hollywood, and appearing on *Saturday Night Live!* R. 21,850.

issues relating to Olympic Park safety. For these reasons the Georgia Court of Appeals had no trouble finding petitioner "voluntarily assumed a position of influence in the controversy [over Park safety]." Petition at 18a.

Although both the trial court and the Court of Appeals found petitioner's intent clear, *Gertz* did not reserve public figure status for those who set out with the specific intention of assuming a place of influence in a public controversy. Under *Gertz* an individual relinquishes his status as a private figure if he "voluntarily injects himself *or is drawn into* a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." *Gertz*, 418 U.S. at 351 (emphasis added).

Petitioner strives to create the appearance of a conflict between *Waldbaum* and *Silvester* on the one hand, and *Gertz* on the other. However, these long-standing decisions, which petitioner relied on below, simply refined and added analytical guidance to *Gertz*'s fairly broad definition of public figures. One of the helpful elucidations provided by *Waldbaum* and *Silvester* is the recognition that the question of whether a plaintiff intentionally entered into a controversy in order to influence its outcome is not evaluated solely in light of the plaintiff's *post-hoc* litigation claims.

Under *Waldbaum* and *Silvester*, plaintiffs who engage in conduct that can reasonably be expected to gain them prominence and influence in a public controversy, and that does in fact gain them such prominence and influence, must be treated as having intended that result. *Waldbaum* and *Silvester* thus recognize that in order for an individual to become a public figure he "either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to

have an impact on its resolution." *Waldbaum*, 627 F.2d at 1297; *see also Silvester*, 839 F.2d at 1496.

It would defy logic to interpret *Gertz* as permitting a plaintiff who has voluntarily assumed a place of prominence and influence in a public controversy to avoid the status of a public figure simply by claiming that he did not subjectively intend to do so. As *Waldbaum* explains, a plaintiff's status must be examined from an objective viewpoint both because it allows individuals to choose their actions appropriately and because it preserves the protections the First Amendment provides to the press:

> This objective approach should enable both the press and the individual in question to assess the individual's status, in advance, against the same yardstick. . . . [L]ooking only to what the individual thought would charge the press with discovering and evaluating the inner beliefs and peculiarities of particular individuals and thus would deprive the media of the very "breathing space" that *New York Times* sought to create and protect. Resolving these questions based on what a reasonable person, looking at the entire situation, would conclude allows the press and the individual to evaluate public-figure status against a single, discoverable norm and from there to act as they see fit, understanding the consequences of their conduct under *New York Times*.

627 F.2d at 1293-94.

This statement is entirely consistent with the Court's holding in *Gertz*. Under *Gertz*, citizens who gain access to the press, and who use that access to speak out prominently on a public controversy, must be deemed public figures.

This is because in doing so they must be presumed to have "invite[d] attention and comment." *Gertz*, 418 U.S. at 345. As the Court emphasized in *Gertz*, "[e]ven if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that . . . public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Id.*[11]

This case provides an excellent example of the problem that *Gertz, Waldbaum* and *Silvester* guard against. In the trial court, petitioner attempted to avoid being held a public figure by submitting an affidavit stating that he did not intend to influence any public issue when he made his many media appearances. However, under the long-standing test that petitioner himself previously relied upon, and consistent with the rationale of *Gertz*, it is an individual's pre-litigation actions and not his own self-serving, *post-hoc*, litigation testimony that determines his public figure status.

Here, both the trial court and the Georgia Court of Appeals reviewed the entire factual record and properly concluded that petitioner voluntarily assumed a position of prominence in the controversy over Olympic Park safety in order to influence that controversy. *See, e.g.*, Petition at 18a ("Jewell's actions show that he voluntarily assumed a position of influence in the controversy [over Park security]."); *id.* at 20a ("Viewed objectively, Jewell's

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[11] In *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), the Court also looked beyond the plaintiff's subjective intent, holding that the plaintiff was not a public figure because there was no evidence that his decision not to appear before a grand jury "was intended to have, *or did in fact have*, any effect on any issue of public concern. In short, we find no basis whatsoever for concluding that plaintiff relinquished, to any degree, his interest in the protection of his own name." *Id.* at 168 (emphasis added).

numerous media appearances in the days following the bombing reveal that he attempted to improve the public's perception of security at the park.").

II. The Decision Below Does Not Conflict With The Court's Decision In *Hutchinson* And In No Way Authorizes Libel Defendants To Convert Private Individuals Into Public Figures Unilaterally.

In his second argument, petitioner asserts that certiorari is needed because the decision below allegedly conflicts with this Court's ruling in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). In fact, this case does not bear even a passing similarity to *Hutchinson*. In this regard, it is worth noting that petitioner assiduously avoids discussing the facts of *Hutchinson* and mentions the case only twice in his entire argument.

In *Hutchinson*, Senator William Proxmire issued a "Golden Fleece" award to several federal agencies as a means of censuring their funding of research by the plaintiff, Ronald Hutchinson. 443 U.S. at 114-116. The award was intended to publicize what Proxmire perceived as "the most egregious examples of wasteful governmental spending." *Id.* at 114. In publicly announcing the award, Proxmire disparaged the plaintiff's work and accused him of gouging the American taxpayers, who ultimately paid for the allegedly "worthless" research. *Id.* at 116.

Hutchinson sued Proxmire for defamation. Proxmire in turn argued that Hutchinson was a public figure for purposes of the "controversy" surrounding his research. This Court held that the plaintiff was not a public figure at the time Proxmire issued the Golden Fleece award because no controversy had existed over the plaintiff's research prior to the announcement of the award. *Id.* at 135-36.

In so ruling, the Court rejected the notion that a defendant may launch disparaging public attacks on a private individual, and then claim that those attacks themselves constitute the public controversy for which the plaintiff is a public figure. As the Court put it, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* at 135.

Here, The Journal-Constitution did not create the controversy for which petitioner became a public figure. The record shows, and both courts below found, that the controversy over Olympic Park safety existed prior to The Journal-Constitution's publication of the statements that petitioner claims defamed him. *See* Petition at 12a-14a.

Indeed, the media appearances in which petitioner spoke out on the Olympic Park safety controversy all occurred prior to publication of the first allegedly defamatory article. *See* Petition at 12a-14a; discussion *supra* at 2-5. Thus, petitioner's public figure status was full blown before any of the challenged articles were published. In short, this case bears no resemblance to *Hutchinson* and the decision below certainly is not in conflict with *Hutchinson*.

Nonetheless, petitioner attempts to manufacture a conflict by arguing repeatedly that it was "the media" and not he who made him a public figure. *E.g.*, Petition at 18. As a preliminary matter, The Journal-Constitution is not responsible for the actions of "the media." Any attempt by petitioner to shoehorn this case into the mold of *Hutchinson* must rely on a showing that The Journal-Constitution was specifically responsible for his ascension to public figure status. Of course, even petitioner has not made this claim.

An equally fundamental flaw in petitioner's argument is that its factual predicate is baseless. In essence, petitioner argues that he falls within *Hutchinson* because "the media" made him a public figure while he played an essentially passive role. Specifically, petitioner claims that the court below held he became a public figure merely "by agreeing to media requests to be an on-the-record source for first-hand information about the bombing." Petition at 19.

The Georgia Court of Appeals held no such thing. Petitioner initially gained attention due to his role in the bombing response. Petitioner then reacted to that attention by authorizing a media expert to arrange media appearances on his behalf and by making numerous appearances with prominent press outlets. The Court of Appeals did not hold that petitioner became a public figure merely because he agreed to be a source. The court held that petitioner became a public figure because he made enough media appearances to achieve a high degree of prominence, and then used that prominence to weigh in repeatedly on a public controversy.

Nor did petitioner act merely as an "eyewitness" source for information about the bombing, as he repeatedly claims. Both courts below made specific factual findings to the contrary. As demonstrated above, both courts reviewed the entire record, including videotapes of petitioner's televised appearances, and confirmed that he repeatedly weighed in on the public controversy over Olympic Park safety. *See* Petition at 12a-14a, 17a-20a, 29a-31a, 38a-40a.

The remainder of petitioner's argument consists of generalized claims that the Georgia Court of Appeals' voluntary public figure ruling should be "viewed with disfavor" because it supposedly will have a chilling effect on news sources and allegedly deprives petitioner of his First Amendment rights. *See* Petition at 19-22.

The first of these contentions, this is simply another reiteration of the baseless assertion that the Georgia Court of Appeals somehow ruled that all news sources automatically become public figures if they provide any factual account of an event to a member of the press. As discussed previously, the Court of Appeals specifically found that petitioner was *not* merely an on-the-record news source. He was an individual who gained unusual prominence through repeated media appearances with a variety of prominent media outlets, and who used those appearances to weigh in repeatedly on an important public controversy. *See* discussion *supra* at 2-8.

As to petitioner's contention that the decision below somehow violates his First Amendment rights, his complaint lies not with the court below, but with this Court's entire First Amendment jurisprudence. Petitioner's basic thesis is that because his public figure status accrued to him as a result of his decision to speak in the press, and because that status makes it harder for him to collect damages in a lawsuit, his free speech rights have been violated.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court emphasized that decisions on how far the law of defamation may encroach on free speech must be made "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. *Gertz* struck the balance with respect to voluntary public figures, holding that individuals who ascend to positions of influence in public controversies "invite attention and comment" and thereby expose themselves to increased risk of injury arising from commentary germane to their role in such controversies. *See* 418 U.S. at 345. Of course, the most common way that individuals gain prominence in

public controversies is by airing their views in the press. Consequently, *Gertz* recognizes that public figures generally "enjoy significantly greater access to the channels of effective communication . . . than private individuals." *Id.* at 344.

The Court thus has established a framework providing clear notice to citizens, like petitioner, who contemplate going before the public to speak out: when one becomes involved in a matter of public controversy, one must accept the corresponding right of the press to the broadest protections of the First Amendment when reporting on matters germane to that controversy. *Id.* at 342-45.

In short, petitioner enjoyed no First Amendment right to both rise to a place of influence in a public controversy through his repeated media appearances, and simultaneously claim the status and rights of a private individual. Nor is his speech chilled because his actions are met with the constitutional consequences prescribed by this Court's rulings in *New York Times* and *Gertz*.

III. This Court's Decision In *Gertz* Specifically Recognized The Category Of Involuntary Public Figures, The Court Has Not Overruled That Decision, And No Conflict Exists Among Federal Appellate Courts Over The Validity Of The Involuntary Public Figure Doctrine.

In addition to finding that petitioner was a voluntary limited-purpose public figure by virtue of his decision to speak out repeatedly on matters pertaining to a public controversy, the court below also offered an alternative, secondary holding. Specifically, the Georgia Court of Appeals held that even if petitioner were not already a

voluntary public figure, he still would qualify as an involuntary public figure. *See* Petition at 22a-24a.

Petitioner claims that certiorari is necessary because this alternative ruling allegedly conflicts with decisions of this Court that have "refused to recognize the existence of the category of involuntary public figures." Petition at 11. Petitioner faces two primary obstacles in making this argument. The first is that the Court's seminal public figure case specifically recognized the category of involuntary public figures. *See Gertz*, 418 U.S. at 345. The second is that none of the subsequent cases that petitioner cites to as overruling *Gertz* even involved a claim of involuntary public figure status, much less contained a ruling on the issue.

Plaintiff begins by asserting that *Gertz* recognized only two kinds of public figures: voluntary all-purpose public figures, and voluntary limited-purpose public figures. Petition at 12. To the contrary, *Gertz* also recognized a third category of public figures when it stated that although "instances of truly involuntary public figures must be exceedingly rare," the potential exists for "someone to become a public figure through no purposeful action of his own." 418 U.S. at 345. The Court then stated that "[f]or the most part" those who attain public figure status fall within the two classes of voluntary public figures. *Id.*

Petitioner goes on to suggest that this Court has rejected the involuntary public figure category because its post-*Gertz* decisions "make no reference to the category of an involuntary public figure." Petition at 12. This should come as no surprise because the question of involuntary public figure status was never raised in those cases.

It also was unnecessary for the Court to discuss the involuntary public figure doctrine in those cases because the

Court found the plaintiffs could not be public figures *of any kind* since they had not occupied prominent positions in public controversies. *See Firestone*, 424 U.S. at 454-55 (plaintiff's private divorce did not constitute a public controversy and she therefore "assumed no 'special prominence in the resolution of public questions'") (quoting *Gertz*, 418 U.S. at 351); *Wolston*, 443 U.S. at 167 (plaintiff was not a public figure because the plaintiff "played only a minor role in whatever public controversy there may have been"); *Hutchinson*, 443 U.S. at 135 ("Hutchinson at no time assumed any role of public prominence in the broad question of concern about expenditures.").

As a fallback position, plaintiff argues that federal appellate courts are supposedly "clearly in conflict" over the validity of the involuntary public figure doctrine. Petition at 17 n.16. Petitioner offers an extensive string cite of cases in which federal circuit courts allegedly have "implicitly rejected" or "failed to expressly recognize" the involuntary public figure category. *Id.* Once more, petitioner relies on cases in which the involuntary public figure doctrine was never even raised. *See id.* Moreover, one decision has been vacated, another raised only the issue of the plaintiff's public *official* status, and another decision involved a plaintiff who simply conceded her public figure status.[12]

It is not surprising that these federal circuit courts have not "expressly recognized" the involuntary public figure doctrine in cases where the issue was not litigated. Similarly, the failure to discuss the involuntary public figure

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[12] *See Bichler v. Union Bank and Trust Co.*, 715 F.2d 1059, 1064-65 (6th Cir.), *vacated*, 718 F.2d 802 (6th Cir. 1983); *Garcia v. Board of Educ. of Socorro Consol. School Dist.*, 777 F.2d 1403, 1407-11 (10th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1190 (9th Cir.), *cert. denied*, 493 U.S. 812 (1989).

issue in cases where the parties have not raised it does not constitute a rejection of the doctrine, implicit or otherwise.[13]

In fact, petitioner has identified only two federal appeals cases where the involuntary public figure doctrine actually was ruled upon. *See Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000); *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir.), *cert. denied*, 476 U.S. 1141 (1985).[14] Both of those cases relied upon *Gertz* in recognizing the category of involuntary public figures. *See Wells*, 186 F.3d at 532; *Dameron*, 779 F.2d at 741-43.[15]

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[13] Petitioner also claims that two federal trial courts and three state courts have held that the involuntary public figure classification "does not exist." Petition at 13 n.11. Again, petitioner relies on cases where the involuntary public figure issue was neither raised nor ruled upon. For example, the trial court decision in *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984), specifically emphasized that it had not even been alleged that the plaintiff in that case was an involuntary figure. *Id.* at 1115 n.6. The decision in *Franklin v. Benevolent and Protective Order of Elks*, 97 Cal. App. 3d 915 (1979), contains no suggestion that the involuntary public figure doctrine ever was raised in that case. Likewise, the doctrine was not at issue in either *Jones v. Palmer Communications, Inc.* 440 N.W.2d 884 (Iowa 1989) or *Burgess v. Reformer Pub. Corp.*, 508 A.2d 1359 (Vt. 1986). The court in *Jones* did note, however, that "The Supreme Court has recognized certain types of public figures, including the all purpose public figure, the limited purpose public figure, *and the involuntary public figure*." 440 N.W.2d at 895 (emphasis added).

[14] Petitioner also asserts that the doctrine was adopted in *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976). However, in that decision the court simply noted that "plaintiffs admit that they are both public figures" and the opinion does not even mention the involuntary public figure doctrine. *Id.* at 209-10.

[15] Although the *Wells* case offers a different analysis than *Dameron*, petitioner would qualify under that analysis as well because he became a central figure in a "significant public controversy" and "assumed the risk of publicity" through his press forays. *See Wells*, 186 F.3d at 539-40.

The Georgia Court of Appeals' reliance on *Dameron*'s analysis for identifying involuntary public figures also does not constitute a return to *Rosenbloom*, as plaintiff suggests. *See* Petition at 15. The plurality in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), purported to extend the *New York Times* actual malice rule to all statements relating to any involvement by an individual in any "event of public or general concern." *Id.* at 52. *Dameron*, on the other hand, requires more than just some involvement in an event of "general concern." *Dameron* requires the existence of a bonafide public controversy and further requires that the plaintiff must have achieved a position of "special prominence" in the resolution of that public controversy without any volition. 779 F.2d at 742 (citing *Gertz*, 418 U.S. at 351).

Plaintiff finally argues that the *Dameron* test is too broad because under it an individual may become an involuntary public figure through "sheer bad luck," while bad luck "is relatively common." Petition at 15 n.14 (*citing Wells*, 186 F.3d at 539). Bad luck may be common, but the degree of bad luck necessary for an individual to end up in a place of special influence as a central figure[16] in a true public controversy *involuntarily* is, as *Gertz* recognizes, "exceedingly rare." 418 U.S. at 345. Petitioner has identified only two cases where courts have found involuntary public figures under the *Dameron* analysis --

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[16] Given the high bar set by the *Dameron* test, petitioner's claim that every person "involved in or associated with" the September 11 terrorist attacks would qualify as an involuntary public figure under the decision below is empty hyperbole. *See* Petition at 16 n.15. First, a legitimate public controversy would have to be identified, and then a private individual would have had to become a central figure in the resolution of that controversy without any volition.

Dameron and the present case.[17] There can be no question that the doctrine has remained as narrowly drawn and strictly applied as *Gertz* initially intended.

CONCLUSION

For all the foregoing reasons, respondents respectfully request that the petition be denied.

Respectfully submitted,

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[17] In this regard, it is worth noting that the court below first held petitioner to be a *voluntary* public figure. Only then did the court go on to state that "even if" plaintiff were not a voluntary public figure, "at the very least" he would still be an involuntary public figure. Petition at 22a.